

ARBITRATION DECISION

IN RE

Sappi - Cloquet LLC
Cloquet, Minnesota

and

FMCS #05-04849

PACE Local 63, USW

DISPUTE:

_____ termination.

Arbitrator:
Daniel G. Jacobowski, Esq.
January 10, 2006

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JURISDICTION

APPEARANCES: Company: Attorney Denis E. Cole, Garden City, New York.

Union: PACE International Rep Marvin Finendale, Superior, Wisconsin.

HEARING: Conducted on October 4, 2005 at the company office in Cloquet, on this contract grievance, pursuant to the stipulations and procedures of the parties under their collective bargaining agreement. Briefs were received November 14, 2005.

DISPUTE

ISSUE: Did the company have proper just cause for its termination of _____? If not, what is the appropriate remedy?

CASE SYNOPSIS: Grievant _____ was discharged for scanning and watching pornography on a company computer, in violation of company policy prohibiting inappropriate computer use and sex harassment. The union admits his conduct was wrongful but claims that the discharge penalty was too severe, and that a company policy statement providing for termination if caught was a violation of the contract.

CONTRACT PROVISIONS applicable or cited:

II. MANAGEMENT RIGHTS CLAUSE

"...to...discipline, suspend or discharge employees for proper cause.."

IX. SENIORITY

"Loss of Seniority. Seniority shall be lost and the employment relationship shall be terminated by:

A. Discharge for just cause;..."

XVII. CONSULTATION PROCEDURE FOR PERFORMANCE IMPROVEMENT

"At Cloquet you are responsible for your own behavior. In situations in which your conduct, attitude, job performance, or absenteeism prevents you from meeting behavioral or performance standards of your team and the site, then problem solving and progressive corrective action steps will ensue....

If the issue persists, you will be provided with paid time off to decide if you wish to continue employment at Cloquet. This is called the "Decision Step."...If the issue persists further, the company may terminate your employment.

Depending upon the facts and evidence you may be placed at the Decision Step or be terminated at the first offense for significant infractions, which include but are not limited to the following:...

7. Willful violation of mill rules or policies..."

XXIII. MILL RULES

"The Company reserves the right to change, add, and delete said mill rules provided such changes do not conflict with any of the provisions of the Labor Agreement or a mandatory subject of bargaining."

XXVI. SCOPE OF AGREEMENT

"This Agreement represents the entire Agreement between the parties with respect to the subject matter hereof...no changes, which are mandatory subjects of bargaining, can be instituted unless by mutual agreement of the parties and signed by the signatories of this Agreement..."

COMPANY POLICIES:

SAPPI IT PROCEDURE MARCH 31, 2001

"5.2 Appropriate Use:

The use of company-owned computing devices is intended for business purposes only...

Computing facilities will not be used inappropriately. Examples include, but are not limited to:...

Downloading, storing or viewing of inappropriate software - pornography, etc...

5.3 Management:

Violation of this policy will result in disciplinary action, up to and including dismissal."

CLOQUET - MISUSE OF COMPANY TIME -
INTERNET USAGE - JULY 9, 2004

"I am disappointed that I must send this letter to all employees, but the misuse of company computers for entertaining purposes has become a real problem....

I am particularly disappointed that, in spite of specifically addressing the company's Zero Tolerance policy on usage of company time and computers to access any pornographic material, some of our employees have continued to do so.

These activities have led to the termination of one employee in violation of the Sexual Harassment and Internet Use policies...

The terminated employee is being reinstated under a Last Chance Agreement because we, the company, may not have been perfectly clear about the consequences of these activities. Therefore, let me be perfectly clear: **The computers and internet access installed on the company premises are never be used for entertainment purposes (including, but not limited to pornography, chatting, games, on-line magazines, or general surfing).** We have, and will periodically utilize, the ability to monitor Internet usage and if you are caught participating in these activities, you will be terminated..."

BACKGROUND - FACTS

In 2002 Sappi acquired the long-established Potlatch Pulp and Paper Mill in Cloquet. It then hired as new employees many of the former Potlatch employees, including the grievant on May 13, 2002. Generally he has a record as a good employee. (Previously he had worked for Potlatch since 1983.)

The company case. Many of the company employees have the use of the company computers for work. The company has had a general policy prohibiting using the computers for non-business purposes and viewing pornography. It explained that such is a misuse of company time, violates the sex harassment policy of a hostile work environment, and increases the risk of a virus shutdown.

In 2004 the company was concerned over a growing problem of computer misuse and pornography viewing that it conducted a special training session in March 2004 on sex harassment prevention. The grievant was among those attending.

In July 2004 another employee was terminated for improper pornography internet viewing but on union appeal rehired under a last chance agreement. In companion with this the union agreed that a clarifying letter to all employees of the company policy should be written so that there would be no misunderstanding of it. This led to the company policy letter to all employees of July 9, 2004 which outlined the prohibition of misuse of company time and internet usage for pornography viewing which would result in termination for those caught. (Arbitrator note: This provision for immediate termination is the focus of the union challenge.) The company noted that at the time and since there had been no grievance or challenge by the union of that letter until this hearing.

In May 2005 over a period of several days the company noted a number of virus alerts indicating misuse among its computers. On June 2 and 3 the IT manager investigated and started to monitor such instances by use of the DAMEWARE program. He was able to obtain copies of the explicit, graphic pornographic pictures that were being shown on a particular company computer. When supervision checked, the user was gone but the grievant was suspected. After a shutdown operation of several days on June 10 the IT manager again noticed the same computer misuse for pornography. He had the supervisor check the location and the grievant was found in the room on the computer. The supervisor left and reported back to the IT manager who noted that the computer pornographic use had again been turned on. The supervisor then returned and removed the grievant from the room.

Having been caught, a meeting was then held with the grievant and the union in which he initially denied turning on the pornography and explaining that when he began using the computer the pornography images just kept popping out and he couldn't turn them off. The company knew this was a falsehood since the computer records showed that he himself had logged on to the pornographic material by use of his own first name.

Later the grievant did admit the misuse of viewing pornography and that his first explanation was a falsehood. The grievant admitted he was aware of the company policy prohibiting such misuse. After review of the matter by management the grievant was terminated on June 15, 2005 for violation of the internet usage and the sex harassment policy. At the hearing the company produced many copies of the graphic pornographic printouts.

The union case. The union had several testify that the grievant was a good employee and no problems as an operator.

The union president was familiar with the last chance agreement given an employee in the prior year and stated that it was because it involved kiddie porn of a suspected employee and that he did not understand it to pertain to pornography in general which the July 9, 2004 letter addressed. He thought the purpose

of that letter was to address children pornography and he otherwise was not involved in the contents of the letter. The union felt that the provision for immediate discharge was a unilateral company policy change in violation of the requirement of mandatory bargaining and the scope of the agreement clause.

In rebuttal and challenge, the company stated that there had been no prior limit referenced to kiddie porn until this union assertion at the hearing. Also it noted the union's admission that there had been no prior grievance nor protest of the July 9, 2004 policy letter and its provision for termination until this hearing.

ARGUMENT

COMPANY: In brief summary, the company argued the following main points in support of the discharge. 1. There is no basis nor validity to the union claim that the July 9, 2004 policy letter was a change in violation of the contract. The union had raised no objection to the letter at any time since it was issued until this hearing. 2. The contract clearly allows for discharge for misconduct and for termination for serious infractions, including willful violation of company policies. The circumstances of the last chance agreement in companion with the company letter which the union requested for clarity indicates the union was fully advised of and in approval of the company policy. 3. The union claim that the company letter was only related to kiddie porn was never before raised and was denied by the company. 4. The company March 2004 training emphasized that bringing pornography into the mill via the internet violates the hostile environment component of the sex harassment policy and that there was zero tolerance for so doing. 5. The grievant was terminated for proper cause. The union admitted to his misconduct. 6. The grievant's surfing for pornography exposed the facility to the hazard of computer viruses. At the same time frame, the corporate server in Maine crashed. The company computers were noted with the virus alerts. 7. The company properly investigated and monitored the computer misuse which ultimately led to the identity of the grievant. 8. The grievant logged onto the computer in his own name, sought to shut it off when the supervisor first discovered him in the room, and then returned to the computer misuse of pornography after the supervisor left, and then falsely sought to explain himself when first questioned by management at a later meeting, which indicates the grievant's culpability and untrustworthiness. 9. Respectfully, the company had full proper cause to discharge the grievant and its decision should be upheld.

UNION: In brief summary, the union argues the following main points. 1. It stipulates and admits the wrongdoing of the grievant but maintains that the discharge was too severe and not justified. 2. The grievant was on the internet for less than one hour. There was no evidence of any loss of production or that the grievant's job suffered. 3. The grievant was a good

employee. 4. The contract prohibits unilateral changes in working conditions by the company. 5. The company July 9 letter which provides for termination conflicts with the procedure for progressive discipline and represents a change in the working conditions. 6. The termination was not justified and request is made that the discipline be reduced and that the grievant be reinstated with full seniority rights and made whole for all lost wages and benefits.

DISCUSSION - ANALYSIS

I have given this case extensive review and deliberation. Based thereon I have come to the conclusion that the discharge was not justified, for the following reasons and factors.

1. First I find the company is fully justified in its policy prohibiting the use of computers for non-business use and viewing pornography in particular, and regarding such misconduct as serious matters for discipline.

2. I next find the evidence is clear that the employee did engage in such misconduct of unauthorized computer use for graphic pornography viewing in violation of this policy. The seriousness is further enhanced by the fact that he did this extensively for almost an hour, and while the plant was in a busy startup after the prior shutdown.

3. His culpability was further increased by his continued pornography viewing after his supervisor first entered and then left the room. Also by his initial false lies about his usage before his later admissions when confronted by the company.

4. Computer misuse had become serious at the company which it legitimately sought to correct. He was aware of the company policy prohibiting such misuse. These considerations merit a serious discipline.

5. While I find that the general policy prohibiting computer misuse and pornography viewing is justified in its July 9, 2004 letter, the penalty for automatic termination if caught I find to be troublesome and inconsistent with the other provisions of the contract. The penalty would be more palatable and acceptable if the penalty read that a person caught would be subject to serious discipline up to and including discharge as has been used elsewhere in the contract and company policy. Among such inconsistencies are the following.

6. The contract itself generally provides for just cause, which traditionally can encompass many circumstances and considerations. The prior Sappi policy which prohibited computer use for non-business purposes including pornography viewing provided that violations will result in disciplinary action up to and including dismissal. Page 22 of the contract itself allows

for decision step termination for significant infractions depending upon the facts and evidence. On page 44 of the contract attachment 1 allows for various types of discipline in the case of sex harassment violations. Further, although the company cited a sex harassment violation as among the reasons for the discharge along with computer misuse, arguably this was not a sex harassment matter since it did not involve any other persons.

7. Accordingly, I find that the penalty of automatic termination in the July 9, 2004 letter is excessive and must be consistent with the contract general requirements of just cause and the consideration of facts and circumstances to merit the serious infraction of a discharge. The contract provisions were negotiated with the union. The penalty in the July 9 letter was unilaterally imposed by the company.

8. As an appropriate remedy, I find and award that the discharge is to be reduced to a six-day suspension and a decision step of one-year probation as provided on page 22 of the contract.

DECISION - AWARD

DECISION: The discharge was in violation of the contract. The union grievance is sustained.

AWARD: The company is directed to revoke the discharge and reduce it to a penalty of a six-day suspension and a decision step probation for one year. Further, the company is directed to reinstate the grievant accordingly with full restoration of rights and benefits and back pay less the suspension period and any other interim earnings or compensation the grievant may have received due to the termination. The arbitrator will retain jurisdiction in the event of any further dispute over implementation of the award.

Dated: January 10, 2006

Submitted by:

Daniel G. Jacobowski, Esq.
Arbitrator